

Appeal from a decision of the District Manager, Ukiah District, California, Bureau of Land Management, rejecting an application for lease of a road for vehicular access to private land within a wilderness area. CACA-24467.

Affirmed in part, set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976:
Leases -- Wilderness Act

It is within BLM's authority to require an owner of a tract of private land within a designated wilderness area to obtain a lease of lands used for vehicular access to the inholding pursuant to sec. 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988).

2. Federal Land Policy and Management Act of 1976: --Leases-- Rent--
Wilderness Act

If the appraisal setting fair market rental value fails to consider the effect of restrictive clauses limiting the use and enjoyment of the leased land on the fair market rental value, the appraisal will be set aside and the case file will be remanded to consider rental reductions reflecting those restrictions.

APPEARANCES: Mathilda B. Williams, pro se, and for Jack F. Brown.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mathilda B. Williams and Jack F. Brown (Williams and Brown) have appealed from an October 4, 1990, decision of the District Manager, Ukiah District, California, Bureau of Land Management (BLM), rejecting their application to lease the Big Butte Road for vehicular access in the Yolla Bolly-Middle Eel Wilderness Area (Wilderness Area) to their private inholding.

Williams and Brown, the daughter and son of Frank S. Brown, are successors-in-interest to a parcel of private land in sec. 25, T. 25 N.,

R. 12 W., Mount Diablo Meridian, Trinity County, California. Access to this property, which is entirely within the Wilderness Area, is gained by travel along the Big Butte Road and then a jeep road running south from that road. The land traversed by these roads was included in the Wilderness Area when Congress made the 7,200-acre Big Butte addition to the Wilderness Area. 1/

Following the wilderness area designation, BLM prepared an "Interim Wilderness Management Plan" (Interim Plan) and an Environmental Assessment to set out BLM's strategy for managing the Wilderness Area. In the course of its analysis, BLM considered its responsibility to protect the access to private land within the Wilderness Area, which predated the wilderness area designation, while preserving and enhancing its wilderness character. 2/ The Interim Plan was approved by the California State Director on October 12, 1988. It states, at page 5, that the "short-term policy of the BLM will be to manage the Big Butte Road in a manner consistent with the maintenance of wilderness resources while allowing the legitimate use of the road by affected private landowners." 3/ In furtherance of the stated policy, the plan prescribes that "[p]rivate landowners surrounded by wilderness will be required to obtain a permit from the BLM for access to private property." 4/ Id.

On June 19, 1989, the District Manager issued a Notice of Realty Action (NORA) (54 FR 27216 (June 28, 1989)) pursuant to 43 CFR 8364.1, providing for closure of the Big Butte Road and all other roads within the "Big Butte Unit" of the Wilderness Area to all vehicular use, effective July 31, 1989, with the exception of "administrative access" and access by owners of the private inholdings who had been leased the right to use the roads.

The NORA stated that designation of the land as part of a Wilderness Area precluded BLM from issuing further rights-of-way pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended.

1/ The roadway at issue is in sec. 11, T. 24 N., R. 12 W., and secs. 23 through 26 and 35, T. 25 N., R. 12 W., Mount Diablo Meridian, Trinity and Mendocino Counties, California. It lies in a 42,000-acre addition of Federal lands to the Wilderness Area, effected by section 101(a)(36) of the California Wilderness Act of 1984, 98 Stat. 1623.

2/ During this process, BLM analyzed a number of alternatives for opening, closing, rehabilitating and/or realigning all or portions of the Big Butte Road and the jeep road. The final decision was to close the southern portion of the jeep road (not involved here), and to rehabilitate the Big Butte Road. See Memorandum from the Area Manager, Arcata Resource Area, California, BLM, to the District Manager, dated June 6, 1988; Interim Plan at 6-7.

3/ BLM's long-term policy is to acquire all private inholdings, rehabilitate the Big Butte Road, and close the jeep road. See Interim Plan at 7.

4/ At the time, four private parties owned land surrounded by the Wilderness Area, i.e., the Siller Brothers, Richard Wilson, Louisiana-Pacific Corporation (Louisiana-Pacific), and Frank S. Brown.

43 U.S.C. §§ 1761-1771 (1988). 5/ It stated that, in order to satisfy the right of reasonable access guaranteed to owners of private inholdings by the California Wilderness Act of 1984 and the Wilderness Act, as amended, 16 U.S.C. §§ 1131-1136 (1988), BLM would issue leases pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizing vehicular access to the inholdings. The Notice also stated that lease applications would be accepted from inholding owners, who would be required to reimburse the United States for reasonable administrative and other costs and "pay rent annually in advance of the rental period for use of th[e] road[s]," and that a "formal appraisal has been requested to determine the rent." 54 FR 27216 (June 28, 1989).

On July 10, 1989, Jack F. and Frank S. Brown responded to the June 1989 NORA, requesting a "lease agreement on the Big Butte access road for the year of 1989." 6/ They stated that immediate members of Frank S. Brown's family used the road every year to gain access to his property, using it from 4 to 25 times a year for recreation purposes.

By letter dated August 22, 1989, BLM informed Williams that it proposed to lease the right to use 4.5 miles of the Big Butte Road and the existing jeep road for vehicular access to their property within the Wilderness Area. 7/ A proposed lease for an initial 15-year term was enclosed. BLM requested that Williams and Brown indicate their concurrence with the lease by signing the enclosed lease forms and returning them to BLM, together with the estimated first year's annual rental of \$ 700 and a \$ 50 monitoring fee. 8/ BLM stated that after receipt of the forms and payment it would execute the lease and send Williams and Brown certified copies for their vehicles and keys to the gate at the entrance to the Wilderness Area.

The proposed lease contained major restrictions on the use and enjoyment of the roads. The roads could be used only by the lessees, and the lessee would be required to provide transportation for all contractors and/or clients to and from the Lessee's land in Lessee-owned vehicles, unless BLM authorized the use of other vehicles. The lessees were responsible for all maintenance made necessary by their use of the roads, and

5/ BLM correctly noted that section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), which grants authority to issue road and other rights-of-way, did so "with respect to the public lands * * * (except * * * land designated as wilderness)." (Emphasis added.) There is an apparent conflict between this language and that found in 43 CFR 8560.4-3(b) referring to permits issued under 43 CFR Part 2800.

6/ On July 31, 1989, Williams informed BLM that her father had died, and that the property would be transferred to her and Jack F. Brown.

7/ BLM mailed a letter dated Aug. 3, 1989, proposing the lease to Williams, but it was not claimed and was eventually returned to BLM. BLM then called Williams and was told that she had simply forgotten to pick up her mail. BLM then sent an identical letter dated Aug. 22, 1989.

8/ The proposed lease stated that the rental amount was subject to readjustment after formal appraisal.

when maintaining the roads no mechanized equipment could be used without prior written BLM approval. No vehicular traffic was permitted during periods of "wet road conditions," i.e., when tires would leave ruts in excess of 1-1/2 inches. BLM retained the right to close the roads "when weather conditions are adverse, erosion problems are occurring or the road has been damaged by either man's activity or an Act of Nature." The lease was not transferable and would terminate upon sale of their private inholdings.

BLM received no response from Williams or Brown. On October 2, 1989, BLM sent another letter reiterating that the Big Butte Road had been closed to vehicular traffic effective July 31, 1989, but that BLM would waive closure so long as a lease was being actively pursued. BLM stated that if Williams desired to use vehicles for access to her property she must sign the proposed lease and return it and the required payment "within 30 days." BLM concluded: "Failure to do so will result in the rejection of your lease application and the closure of the Big Butte Road for vehicle use to you."

On October 16, 1989, Williams responded to BLM's October 1989 letter. She objected to being required to lease the right to use the Big Butte Road and jeep road when her family had used the road "since its inception," which was well before passage of the "Wilderness Act." She concluded that the "contrived lease agreement to charge \$ 700 per year for 4.5 miles of limited road use is unfair and unreasonable." (Emphasis in original.) Finally, she indicated that she would not act pending the outcome of negotiations between BLM and Richard Wilson regarding BLM's offer to lease 4.7 miles of the Big Butte Road for vehicular access to Wilson's inholding.

In October 1989, BLM calculated the annual fair market rental value of the Big Butte Road and jeep road for access to the Williams and Brown property, based on a September 1989 appraisal of the portion of the Big Butte Road which BLM had offered to lease to Wilson and Louisiana-Pacific. BLM concluded that the fair market rental value for Williams' and Brown's lease was \$ 900. See Memorandum from the BLM Appraisal Staff to the District Manager, dated October 13, 1989. The rental was calculated by multiplying the 27.3-acre area encompassed by the roads (4.5 miles x 50 feet wide) by the purchase price of a nearby tract (\$ 300 per acre), and an 11 percent rate of return ($27.3 \times \$ 300 \times 0.11 = \$ 900.90$, rounded to \$ 900).

By letter dated September 10, 1990, BLM notified Williams and Brown that it had issued leases to Wilson and Louisiana-Pacific and that they must decide whether they wanted a lease. BLM stated that if they did, it would prepare a "new lease document" similar to the Wilson lease, and that, based on an appraisal, it had determined that the annual rental would be \$ 900. BLM requested Williams to notify it in writing within 15 days of receipt of the letter "whether you want to pursue a lease for vehicle access to your property or withdraw your application and use horses or walk to your property."

When BLM received no response to its September 1990 letter, the District Manager issued his October 1990 decision rejecting the Williams and

Brown lease application "without prejudice," which meant that Williams and Brown could reapply for a lease at any time they desired to secure vehicular access to their property. Williams and Brown appealed from the District Manager's October 1990 decision.

In their statement of reasons for appeal, Williams and Brown contend that they have the "right to use" the Big Butte Road, noting that their family had used the road prior to enactment of the Wilderness Act. They also state that their family helped build the road and have never caused any damage to it.

[1] We start with section 103(a) of the California Wilderness Act of 1984, 98 Stat. 1625, which provides that, "[s]ubject to valid existing rights, each wilderness area designated by [the Act] shall be administered * * * in accordance with the provisions of the Wilderness Act." The question to now be considered is whether Williams and Brown had a "valid existing right" to use the roads traversing the Big Butte addition to the Wilderness Area at the time of the Wilderness Area designation. If they held a valid existing right, they do not need a FLPMA lease to continue that use. See Courtney Ayers, 122 IBLA 275, 278 (1992).

Any valid existing right to continued use of the roads held by Williams and Brown must have been created by either the exercise of Secretarial discretion or by a Federal statute granting that right. See The Bureau of Land Management Wilderness Review & Valid Existing Rights, Solicitor's Opinion, 88 I.D. 909, 912 (1981). First, there is no evidence that the Secretary granted Williams and Brown or their predecessor-in-interest the right to use the Big Butte road or jeep road, either by grant of a right-of-way or otherwise.

The only statute that might be applicable is section 8 of the Act of July 26, 1866 (R.S. 2477), 43 U.S.C. § 932 (1970). Under that statute, either action by a public authority or continued use of a road by the public over a period of time may have resulted in the dedication of a road as a public highway by operation of law. See Ball v. Stephens, 158 P.2d 207, 209 (Cal. Dist. Ct. App. 1945).

The Department may consider whether a public highway has been created under State law to the extent necessary to the administration of the public lands. See Courtney Ayers, supra at 278. We find sufficient evidence to support a conclusion that no public highway was created. First we note that R.S. 2477 was repealed by section 706(a) of FLPMA, P.L. No. 94-579, 90 Stat. 2793 (1976), effective October 21, 1976. This repeal was subject to valid existing land-use rights (see section 701(a), FLPMA, 90 Stat. 2786 (1976)), but any public highway created by R.S. 2477 must have been created prior to the October 21, 1976, repeal. According to a May 8, 1989, Land Report assessing the desirability of leasing the Big Butte Road, BLM noted that road was built by Louisiana-Pacific pursuant to a FLPMA right-of-way (CA-3051) issued by BLM to Louisiana-Pacific on May 23, 1977. See id. Thus, based upon the evidence before us, we conclude that the road was built after the repeal of R.S. 2477. Since the jeep road runs from the Big Butte

road, it is also apparent that it was constructed after the Big Butte Road and also came into existence after the repeal of R.S. 2477.

Our conclusion does not mean that Williams and Brown are precluded from gaining access to their private land within the Wilderness Area. The legislative history of the California Wilderness Act of 1984 clearly indicates the Congressional intent that access would be preserved. The Committee on Energy and Natural Resources declared in S. Rep. No. 582, 98th Cong., 2d Sess. 34 (1984), that, in accordance with the Wilderness Act and section 1323 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210 (1988), "non-federal landowners will have access to their lands, including the continued use or construction of roads, depending upon the location and use of the particular land."

In addition, under the California Wilderness Act of 1984, administration of the Wilderness Area must be "in accordance with the provisions of the Wilderness Act." 98 Stat. 1625 (1984). 9/ Section 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a) (1988), provides that, when privately owned land is entirely surrounded by a designated wilderness, the "private owner shall be given such rights as may be necessary to assure adequate access to such * * * privately owned land by such * * * private owner and [his] successors in interest." 10/ see also 43 CFR 8560.4-3(a).

Section 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), also protects rights of access to private inholdings. See Utah Wilderness Association, 80 IBLA 64, 77, 91 I.D. 165, 173 (1984), vacated on judicial remand (Order, Feb. 26, 1986). Under that Act, the Secretary must provide "such access to non-federal land surrounded by public lands * * * as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof." 16 U.S.C. § 3210(b) (1988). Access must be "commensurate with the reasonable use and enjoyment of the non-Federal land" (Instruction Memorandum (IM) No. 85-579, dated July 26, 1985, at 2).

When Congress incorporated language in the California Wilderness Act of 1984 and the Wilderness Act which guaranteed the right of reasonable access to owners of private inholdings, it did not mandate that the access was to be unrestricted. BLM is required to "prescribe routes and modes of

9/ Under section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), once an area of public lands is designated as wilderness, "the provisions of the Wilderness Act * * * shall apply with respect to the administration and use of such designated area, including * * * access."

10/ As an alternative to affording rights of access, the Wilderness Act provides for an exchange of the privately owned land for other Federally owned land in the same State. See 16 U.S.C. § 1134(a) (1988); 43 CFR 8560.4-3(a). Williams and Brown have not sought an exchange. In May 1988 Jack F. Brown informed BLM that his family did not intend to sell their inholding. See Confirmation/Report of Telephone Conversation, dated May 23, 1988.

travel which will result in impacts of least duration and degree on wilderness characteristics and, at the same time, serve the reasonable purposes for which the lands are held or used." 43 CFR 8560.4-3(c). In addition, BLM has stated its policy that: "Reasonable use and enjoyment need not necessarily require the highest degree of access, but rather, could be some lesser degree of reasonable access" (IM No. 85-579 at 1). ^{11/} Applying these standards, BLM deems access which is reasonably restricted to meet the requirements of 43 CFR 8560.4-3(c) to be "adequate access" under the Wilderness Act (16 U.S.C. § 1134(a) (1988)). See Wilderness Management Policy, dated September 24, 1981, at 12. If BLM grants reasonable access to private inholdings, it is entitled to limit that access to preserve the wilderness character of the land, pursuant to section 4(b) of the Wilderness Act, as amended, 16 U.S.C. § 1133(b) (1988).

In addition, section 1323(b) of ANILCA, which also governs access to private inholdings, provides that such access is to be "subject to such terms and conditions as the Secretary * * * may prescribe." 16 U.S.C. § 3210(b) (1988). The owner of the surrounded private land must "comply with rules and regulations applicable to access across public lands." id.

When BLM drafted the lease offered to Williams and Brown it attached stipulations imposing severe restrictions on their use and enjoyment of the leased lands to strike a balance between two conflicting uses. Williams and Brown object to the lease, but there is nothing in section 5(a) of the Wilderness Act or section 1323(b) of ANILCA that either precludes BLM from granting access through the use of a lease or requires the use of some other mechanism, such as a special-use permit. Further, a lease affords the use of "terms and conditions" (16 U.S.C. § 3210(b) (1988)), which strike a balance between the land uses, allowing BLM to permit access while fulfilling its other function of protecting the wilderness character of the land. See 43 CFR 2920.7(c); IM No. 85-579 at 1.

Williams and Brown have presented nothing on appeal to cause us to conclude that, if the lease is administered fairly and reasonably, with the contemplated grants of permission being reasonably and promptly made, the restrictions imposed are arbitrary or capricious. ^{12/} We have no basis

^{11/} The Director, BLM, stated in IM No. 85-579, at page 1, that, when "determining adequate access, the BLM has discretion to evaluate such things as proposed construction methods and location, to consider reasonable alternatives (trails, alternative routes, including aerial access, and degree of development) and to establish such reasonable terms and conditions as are necessary to protect the public interest."

^{12/} If narrowly interpreted the lease could be construed to unreasonably restrict access to Mathilda B. Williams, the named lessee. However, the general tenor of the correspondence and other terms of the lease indicates an intent to restrict use without written permission to Williams, Brown, and members of their immediate family. There is nothing to indicate that a reasonable request, such as a request for additional certified copies of

for concluding that the proposed lease did not adequately continue their reasonable access right while protecting the wilderness characteristics of the land the road crosses. Therefore, we find that BLM's offer of a FLPMA lease comports with section 5(a) of the Wilderness Act and section 1323(b) of ANILCA. Williams and Brown argue that requiring a lease for vehicular access "discriminates" against members of their family who, because they cannot walk or ride horses, are denied "reasonable access" to the family's land. They also assert that they should have vehicular access in the case of an "emergency." However, we do not find that the language of the lease denies their family reasonable access to their property, as guaranteed by the Wilderness Act and ANILCA.

[2] Williams and Brown also argue that the \$ 900 annual rental is "outrageous AND more than we can afford." Congress' declared policy in FLPMA was that the United States at all times receive "fair market value" for the use of public lands. 43 U.S.C. § 1701(a)(9) (1988). Thus, BLM is required to charge "fair market value" for a lease of the Big Butte Road and the jeep road pursuant to section 302(b) of FLPMA. See 43 CFR 2920.0-6 and 2920.8(a); 46 FR 5776 (Jan. 19, 1981); Sierra Production Service, 118 IBLA 259, 262 (1991).

The general rule is that an appraisal will be affirmed if the appellant fails to show error in BLM's appraisal or that the rental charges are excessive. See Sierra Production Service, supra at 263, Lone Star Steel Co., 79 IBLA 345 (1984). One exception to this general rule is that, when there is sufficient doubt about the method employed in an appraisal, we will set the appraisal aside and direct BLM to reconsider whether a further appraisal or an adjustment in the appraised value should be made. Clinton Ipsom, 83 IBLA 72 (1984); Full Circle, Inc., 35 IBLA 325, 336-37, 85 I.D. 207, 213 (1978).

We find an inherent flaw on the face of the appraisal document, and we must set the appraisal aside and remand the case file to BLM for a further appraisal or adjustment. The appraisal report must indicate "[w]hether the appraiser has given proper consideration * * * to the effect, if any, on the market value of all * * * encumbrances which burden the land." Department of Justice, A Procedural Guide for the Acquisition of Real Property by Government Agencies at 7 (1972). The basis for the fair market rental value determination was the sales price for the sale of fee land. The appraisal notes no encumbrances on this land, and we assume that there

fn. 12 (continued)

the lease for other immediate family members (which must be in a vehicle using the leased road) would be denied. Similarly, we expect that BLM will grant a reasonable request for permission to allow clients or contractors to use their own vehicles or to make mechanized road repair would not be denied without good cause. Any formal decision denying permission when permission is required, renewal upon expiration, or issuance of a replacement lease (either to an heir or a purchaser) could be appealed to this Board.

were none. Similarly, there was absolutely no consideration given to the 11 very restrictive clauses limiting the use and enjoyment of the right-of-way. The appraisal should have considered the reduced value of the right-of-way resulting from the imposition of these stringent restrictions. See, e.g., Clinton Ipsom, supra (remanded to consider rental reduction to reflect restrictions in a residential occupancy permit); Northwest Pipeline Corp. 65 IBLA 245 (1982) (reduced rental value of a pipeline right-of-way when compared to the rental based on the purchase price of similar land).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part.

R.W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

